Kiev: From Zero to 800 Cases Per Year in Less than Ten Years

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THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION

2000/Vol. 11 No. 4

KIEV: FROM ZERO TO 800 CASES PER YEAR IN LESS THAN 10 YEARS

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I. INTRODUCTION

Since 1992, international commercial arbitration in the Ukraine has been conducted by the International Commercial Arbitration Court (the "ICAC") at the Ukrainian Chamber of Commerce and Industry (the "UCCI"). The UCCI also hosts the Maritime Arbitration Commission (the "MAC"). The ICAC is an independent, permanent arbitral institution that carries out its functions in conformity with the Law of the Ukraine on International Commercial Arbitration (the "Law"),[1] the Statute on the ICAC at the UCCI (the "Statute"),[2] and the Rules of the ICAC at the UCCI (the "Rules").[3] The Law is based on the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), but departs from the Model Law in some aspects in order to be better suited to the situation in the Ukraine. The current Rules were adopted in 1994.

The creation of the ICAC was based on the provisions of the European Convention on International Commercial Arbitration (1961). This convention has had great significance for and influence on international commercial arbitration and is the basis for national legislation not only in the Ukraine, but in several other countries as well. Incidentally, this explains why, from a Ukrainian point of view, the changes to the Convention that are presently discussed in the UN/ECE need to be considered very carefully.

The ICAC is the first international court of arbitration in the history of the Ukraine as an independent state. After eight full years of practice, it is now

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[1] The Law was adopted on February 24, 1994. It is available at http://www.ucci.org.ua/arb_law.en.html.

[2] The Statute is an annex to the Law, regulating the establishment and the powers of the ICAC. Since these matters were regulated by the Law, the ICAC did not have to register with the Ministry of Justice of the Ukraine, a procedure which would have been necessary if the ICAC had not been created through special legislation.

[3] The Rules are available at http://www.ucci.org.ua/arb/rules.en.html.

possible to speak about the history of creation and development of the ICAC, and to draw conclusions with regard to the practice of the court.

II. CASELOAD AND ORIGIN OF THE PARTIES

A. *The ICAC*

The caseload of the ICAC has increased substantially over the years, as shown in the following table:

Year	No. of cases decided
1993	28
1994	72
1995	110
1996	209
1997	315
1998	479
1999	860

In 1999, there were 1090 cases under consideration by the ICAC, including the residual of 419 cases not yet decided from the previous year. Thus, 671 new cases were received in 1999. Compared to 1998, there were 192, or 21%, more cases under consideration in 1999. The number of cases decided in 1999 increased by 80% compared to 1998.

Among the 671 cases received by the ICAC in 1999, parties from not less than 57 countries were involved as either respondents or claimants. The origins of the parties were the following:

Of the 671 cases submitted to the ICAC in 1999, 589 cases had non-Ukrainian respondents, as follows:

RESPONDENTS FROM COUNTRIES OUTSIDE THE CIS	306
POLAND	34
USA	28
GERMANY	22
GREAT BRITAIN	19
HUNGARY	18
LITHUANIA	17
SLOVAK REPUBLIC	14
FRANCE	13
BRITISH VIRGIN ISLANDS	12
TURKEY	11
SWITZERLAND	11

(continued on following page)

ITALY	10
BULGARIA	8
AUSTRIA	7
BAHAMAS	7
NETHERLANDS	7
CYPRUS	6
LATVIA	6
ROMANIA	6
CZECH REPUPLIC	5
ESTONIA	5
IRELAND	5
BELIES	4
CUBA	4
ISRAEL	4
BELGIUM	3
CANADA	3
LIECHTENSTEIN	3
NORWAY	2
YUGOSLAVIA	2
ARABIAN EMIRATES	1
CROATIA	1
DENMARK	1
FINLAND	1
GREECE	1
INDIA	1
LEBANON	1
MAURITIUS	1
NEW ZEALAND	1
RUANDU	1

RESPONDENTS FROM COUNTRIES WITHIN THE CIS	**283**
RUSSIA	156
MOLDOVA	37
BELARUS	35
AZERBAIJAN	25
KAZAKHSTAN	9
GEORGIA	9
ARMENIA	5
UZBEKISTAN	4
KIRGIZSTAN	2
TURKMENISTAN	1

In the 80 cases where the respondents were Ukrainian, the claimants were of the following jurisdictions:

FOREIGN CLAIMANTS	80
SLOVAK REPUBLIC	10
POLAND	8
RUSSIA	7
BULGARIA	5
CYPRUS	5
CZECH REPUBLIC	4
LIECHTENSTEIN	4
GERMANY	4
SWITZERLAND	4
USA	4
IRELAND	3
TURKEY	3
LATVIA	2
MOLDOVA	2
SLOVENIA	2
ANDORRA	1
BAHAMAS	1
BELARUS	1
BELGIUM	1
BRITISH VIRGIN ISLANDS	1
FRANCE	1
HUNGARY	1
LITHUANIA	1
NETHERLANDS	1
THE UKRAINIAN RESPONDENTS BEING ENTITIES WITH FOREIGN INVESTMENT	4

B. *The MAC*

In 1999, the MAC received 15 cases, compared to 1 or 2 cases per year in the preceding years. In those 15 cases, the respondents were of the following origins:

ORIGIN OF RESPONDENT	NO. OF CASES
CYPRUS	4
UKRAINE	3
AUSTRIA	2

(*continued on following page*)

BULGARIA	2
TURKEY	2
ARABIAN EMIRATES	1
RUSSIA	1

III. ORGANIZATION OF THE ICAC

The ICAC consists of the President, two Vice-Presidents, the arbitrators and the Secretariat.[4] The President and the Vice-Presidents are members of the Presidium, whose functions are stipulated in the Rules.[5]

IV. COMPETENCE OF THE ICAC

A. *Arbitrable Disputes*

If so agreed by the parties, the following disputes may be referred to the ICAC:

- disputes resulting from contractual and other civil-law relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad; and
- disputes arising between enterprises with foreign investment, international associations and organizations established in the territory of the Ukraine, disputes between their participants, as well as their disputes with other legal entities in the Ukraine.[6]

The competence of the ICAC comprises disputes resulting from relationships of a commercial nature, including, but not limited to, the following transactions: sale/purchase/delivery of goods, contracts of service and labor, exchange of goods and/or services, carriage of goods or passengers, commercial representation and agency, leasing, scientific/technical exchange, exchange of other results of intellectual activity, construction of industrial and other works, licensing operations, investment, financing, insurance, and joint ventures and other forms of industrial and business co-operation.[7]

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4 Art. 2.1 of the Rules.
5 Art. 2.2 of the Rules.
6 Art. 1.2 of the Law, Art. 1.1 paragraph 1 of the Rules.
7 Art. 1.1 paragraph 2 of the Rules.

The ICAC also hears disputes subject to its jurisdiction by virtue of international treaties of the Ukraine.[8]

B. *The Arbitration Agreement*

Under the Law, the ICAC shall accept for consideration disputes submitted to it by a written arbitration agreement by which the parties agree to submit to the ICAC all or certain of the disputes that have arisen, or may arise, between them in connection with a defined legal relationship, whether contractual or not.[9] The arbitration agreement can be made as an arbitration clause in the contract or in the form of a separate agreement, before or after the dispute has arisen.

The arbitration agreement shall be in writing. This requirement does not mean that the arbitration agreement must consist of a single document signed by both parties. The arbitration agreement may be concluded by the exchange of letters, faxes, etc. The Law accepts the conclusion of an arbitration agreement by use of any other means of electronic communication ensuring the written form of the agreement. Thus, an arbitration agreement can be concluded by e-mail and other electronic means. Moreover, an arbitration agreement may be concluded by the exchange of a statement of claim and a statement of defense, where one of the parties alleges the existence of an arbitration agreement and the other party does not object. A reference made in a contract to another document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is of such character that it makes the reference part of the contract.[10]

The Law adopts the doctrine of separability.[11] Hence, a decision by the arbitral tribunal that the contract containing the arbitration clause is null and void does not entail, *ipso jure*, the invalidity of the arbitration clause.

With regard to the contents of the arbitration clause, the most important aspect is that the will of the parties should be expressed clearly. To avoid problems of interpretation, the ICAC strongly advises parties to adopt their recommended arbitration clause:

Recommended Arbitration Clause

> Parties of the foreign trade contract wishing their disputes to be referred to the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce & Industry are recommended to include the following arbitration clause in their contract:

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8 Art. 1.5 of the Rules.
9 Art. 7 of the Law.
10 Art. 2.7.2 of the Law.
11 Art. 16.1 of the Law, Art. 1.4 of the Rules.

Any dispute arising out of the present contract or in connection with it is to be referred for consideration and final settlement to the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce & Industry.

The parties agree that as to consideration and settlement of the dispute the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce & Industry of the Ukraine shall apply.

The parties are also reminded that they can avoid difficulties and extra expenses if they correctly specify the substantive law which shall regulate their contract. The parties can also, at their wish, specify the number of arbitrators, and the place and language of proceedings. The following clauses can be used:

The present agreement shall be regulated by the substantive Law of _____(name of the country).

The Arbitration Court shall be composed of _____(a sole or three arbitrators).

Place of the Arbitration Court meeting shall be _____ (name of the city).

Language of the Arbitration Court proceeding shall be _____ (Ukrainian, Russian or other).

C. *Kompetenz Kompetenz*

The Law grants the arbitral tribunal the right to decide on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.[12]

Any objection against the jurisdiction of the arbitral tribunal shall be raised no later than in the statement of defense. A party is not precluded from making such an objection by the fact that he has appointed an arbitrator, or participated in the appointment of one. A claim that the arbitral tribunal exceeds the scope of its authority must be made as soon as that question which, in a party's opinion, lies beyond that scope arises in the course of the arbitration proceedings.

The arbitral tribunal may rule on its jurisdiction either as a preliminary question or in the final award. If the arbitral tribunal decides, as a preliminary question, that it has jurisdiction to consider the case, any party may, within 30 days of receiving notice of the ruling, request the Kiev District Court to make a final decision on the matter. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.[13]

From the practice of the ICAC it may be noted that the President of the ICAC issues a Decree when agreeing to accept a case. The Decree includes information about the names of the parties, the value of the claim, the legal

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[12] Art. 16.1 of the Law.

[13] Art. 16.3 of the Law, Art. 1.8 of the Rules.

basis for acceptance of the claim by the ICAC, details on payment of the registration fee or arbitration fee, the registration number of the case and the first procedural steps. This acceptance is of a preliminary nature, and the respondent can object to the competence of the ICAC. In such a case, the decision will be taken by the arbitral tribunal as described above.

V. COMPOSITION OF THE ARBITRAL TRIBUNAL

The provisions regarding the appointment of the arbitrator(s) are similar to those provided by the Model Law.

The parties are free to determine the number of arbitrators to be appointed. In the absence of agreement, three arbitrators shall be appointed.[14] Unless otherwise agreed by the parties, no person shall be precluded from acting as an arbitrator by reason of his nationality.[15] Thus, non-Ukrainian nationals and stateless persons can be appointed as arbitrators, but it is necessary to refer to the current list of arbitrators.

The ICAC has a recommendatory list of arbitrators, approved by the Presidium.[16] At present, this list is closed, which means that the parties can only agree on or chose an arbitrator included on this list. The current list contains arbitrators from 17 countries.

The parties are free to agree on the procedure for appointing the arbitrator(s).[17] Failing such an agreement, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator. If a party fails to appoint an arbitrator or if the two arbitrators fail to agree on the third arbitrator, the arbitrator shall be appointed by the President of the UCCI. In an arbitration where a sole arbitrator shall be appointed and the parties fail to agree on the appointment, the sole arbitrator shall be appointed by the President of the UCCI.[18] Where, under an appointment procedure agreed upon by the parties, a party fails to act as required, or the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the president of the UCCI to take necessary measures, unless the agreement on the appointment procedure provides other means for securing an appointment.[19]

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications required by the parties' agreement. A party may challenge an arbitrator whom he has himself appointed only for reasons of

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[14] Art. 10 of the Law, Art. 3.1 of the Rules.
[15] Art. 11.1 of the Law, Art. 3.2 of the Rules.
[16] Art. 2.4 of the Rules.
[17] Art. 11.2 of the Law, Art. 3.3 of the Rules.
[18] Art. 11.3 of the Law, Art. 3.3 of the Rules.
[19] Art. 11.4 of the Law, Art. 3.3 of the Rules.

which he has become aware after the appointment of the arbitrator.[20] The parties are free to agree on a procedure for the challenge of an arbitrator.[21] In the absence of such an agreement, a party that intends to challenge an arbitrator must, within 15 days of becoming aware of the constitution of the arbitral tribunal or of becoming aware of the circumstance that gives rise to the challenge, communicate, in writing, the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal itself shall decide on the challenge.[22] If the challenge is dismissed, the challenging party may request the President of the UCCI to make a final decision on the challenge. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue with the arbitral proceedings and make an award.[23]

VI. THE PROCEEDINGS

As will be demonstrated, many aspects of the arbitral proceedings conform with the Model Law.

A. *Determination of Rules of Procedure*

Subject to the provisions of the Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.[24] In the absence of such an agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate subject to the provisions of the Law.[25]

B. *Ukrainian Procedural Law*

Since the proceedings before the ICAC are governed by the Law and the Rules, there is no obligation for the arbitrators to follow the provisions of the Ukrainian Civil Procedure Code or the Ukrainian Arbitration Procedure Code. For example, attempts to settle the dispute need only be made by the parties if the arbitration agreement so stipulates. However, there is nothing to prevent the arbitrators from seeking guidance in Ukrainian procedural law, should a procedural problem arise. For example, arbitrators frequently apply the provisions in Article 115 of the Ukrainian Civil Procedure Code when it comes to the proper contents of a power of attorney.

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20 Art. 12.2 of the Law, Art. 3.8 of the Rules.
21 Art. 13.1 of the Law, Art. 3.9 of the Rules.
22 Art. 13.2 of the Law.
23 Art. 13.3 of the Law, Art. 3.11 of the Rules.
24 Art. 19.1 of the Law.
25 Art. 19.2 of the Law.

C. *Place of Arbitration*

The parties are free to agree on the place of arbitration.[26] In the absence of agreement, the place of arbitration shall be determined by the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties. The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members; for hearing witnesses, experts or the parties; or for inspection of goods, other property or documents.[27]

D. *Commencement of the Arbitral Proceedings*

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date when a request for arbitration is received by the respondent.[28]

E. *Statement of Claim and Statement of Defense*

The statement of claim shall contain:
- the name of the Arbitration Court;
- the names and postal addresses of the parties;
- an indication of the amount of the claim;
- the claimant's demands;
- the basis for the jurisdiction of the Arbitration Court;
- a comprehensive statement of the facts, evidence and legal arguments supporting the claim; substantiated calculations of the amounts to be recovered or disputed; legislation on which the claim is referred;
- the list of documents and other evidence; and
- the claimant's signature.[29]

The claimant shall enclose copies for the respondent, documents supporting the circumstances on which the claim is based and proof of payment of the registration fee. The parties are free to make reference to documents or other evidence that they will submit later.[30]

Within 30 days from the date of receipt of the statement of claim, the respondent shall submit its statement of defense and all documents supporting its objections to the claim and any counterclaim or set-off, if applicable, unless the parties have agreed otherwise as to the required contents of the statement of defense. The respondent must also communicate to the Arbitration Court

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26 Art. 20.1 of the Law, Art. 4.4. of the Rules.
27 Art. 20.2 of the Law and Art. 4.5 of the Rules.
28 Art. 21 of the Law.
29 Art. 5.2 of the Rules.
30 Art. 5.3 of the Rules.

the name of the arbitrator appointed by it.[31] A counterclaim shall meet the same requirements as the original claim.[32]

In the experience of the ICAC, the statement of claim often does not fulfill all of the requirements laid down in the Rules. Sometimes the statement of claim does not contain the correct or complete name and address of the respondent, resulting in the copy of the statement of claim sent to the respondent being returned to the ICAC. Moreover, the statement of claim is sometimes unsatisfactory by not specifying the claims clearly or by not including the supporting documents.

Unless otherwise agreed by the parties, either party may amend or supplement its claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment in light of the party's delay in making it.[33]

F. *Language of the Arbitration*

The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used. This determination, unless exceptions are expressly allowed, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.[34]

Some comments may be added in this context. Under the Law on Language in the Ukraine, the only state language in the Ukraine is Ukrainian. But in judicial and arbitral proceedings, it is possible to conduct the hearings in Russian when one of the parties is from the Commonwealth of Independent States. The Rules provide that where there is no agreement between the parties in respect of the language to be used in the proceedings, the language to be used shall be Ukrainian or Russian. It is most logical for the arbitral tribunal to choose the language based on the language of the contract and the parties' communications. If the parties have agreed that the language of the proceedings shall be neither Ukrainian nor Russian, they must bear the cost of interpretation on a joint and several basis. If, upon request of one of the parties, the translation of commentaries and instructions of the arbitral tribunal is made into a language other than Ukrainian or Russian, the expenses of the translation shall be borne by the requesting party.

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31 Art. 5.9 of the Rules.
32 Art. 5.10 of the Rules.
33 Art. 5.11 of the Rules.
34 Art. 22 of the Law, Art. 4.7 of the Rules.

G. *Evidence and Hearings*

The powers conferred upon the arbitral tribunal include the power to determine the admissibility, relevance, materiality and weight of any evidence.[35]

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request a competent Ukrainian court to assist in taking evidence.[36] However, during the entire life of the ICAC, this has never been done.

Subject to a contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.[37]

Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues determined by the arbitral tribunal.[38] The arbitral tribunal may also require the parties to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or property for inspection.[39] If the parties have not agreed otherwise, and if a party so requests or if the arbitral tribunal considers it necessary, after delivery of his written or oral report, the expert shall participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the point at issue.[40] In the practice of the ICAC, experts have taken part in several cases, usually involving complicated construction projects. The participation of the experts has worked well, both when requested by the parties and when arranged on the tribunal's own initiative.

Neither the Law nor the Rules contain any provision regarding the examination of witnesses. Witnesses do not testify under oath before the arbitral tribunal. Usually, there is no cross-examination of the witnesses. In fact, the parties seldom ask the tribunal to hear witnesses at all. The reasons for this are to be found in the Ukrainian legal traditions.

H. *Default of a Party*

Unless otherwise agreed by the parties, if, without showing sufficient cause, the claimant fails to communicate his statement of claim in accordance with the requirements provided by the Rules, the arbitral tribunal shall

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35 Art. 19 of the Law.
36 Art. 27 of the Law.
37 Art. 7.1 of the Rules.
38 Art. 26.1 a) of the Law, Art. 7.6 a) of the Rules.
39 Art. 26.1 b) of the Law, Art. 7.6 b) of the Rules.
40 Art. 26.2 of the Law, Art. 7.7 of the Rules.

terminate the proceedings.[41] If, on the other hand, the respondent fails to communicate his statement of defense, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations.[42] If any party fails to appear at a hearing or to produce documentary evidence, the tribunal may continue the proceedings and make the award on the basis of the evidence before it.[43]

I. *Interim Measures*

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of any party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require a party to provide appropriate security in connection with such measure.[44]

J. *Applicable Substantive Law*

The arbitral tribunal shall resolve a dispute in accordance with the legal norms chosen by the parties to apply to the substance of the dispute. Unless otherwise expressed, any designation of the law or legal system of a State shall be interpreted as directly referring to the substantive law of that State and not to its conflict of laws rules.[45] Failing a designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers applicable.[46] The arbitral tribunal may make a decision *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.[47] In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.[48]

If the parties have not chosen the substantive law to be applied to the dispute and the arbitral tribunal decides that the Ukrainian conflict of laws rules shall be applied, it must follow the provisions of Article 6 of the Law on Foreign Economic Activity, unless otherwise agreed by the parties. Under this provision, the rights and obligations of the parties in a foreign economic transaction are defined by the law at the place of its making. The rights and obligations of the parties to foreign economic agreements are defined by the law of the country chosen by the parties at the conclusion of the agreement or

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41 Art. 25 paragraph 1 of the Law, Art. 7.4 a) of the Rules.
42 Art. 25 paragraph 2 of the Law, Art. 7.4 b) of the Rules.
43 Art. 25 paragraph 3 of the Law, Art. 7.4 c) of the Rules.
44 Art. 17 of the Law, Art. 1.4 of the Rules.
45 Art. 28.1 of the Law, Art. 8.1 of the Rules.
46 Art. 28.2 of the Law, Art. 8.2 of the Rules.
47 Art. 28.3 of the Law, Art. 8.3 of the Rules.
48 Art. 28.4 of the Law, Art. 8.4 of the Rules.

negotiated at a later time. We will use the word "contract" in this section in order to denote the Ukrainian term "foreign economic agreement."

If the parties fail to agree on the law to be applied to contracts, the contracts will be governed by the law of the country that is the site of the establishment, residence or main activities of the following parties:

- the seller in a purchase and sale contract;
- the property lender in a hire of property contract;
- the licensor in a licensing contract on the exercise of exclusive or similar rights;
- the keeper in a storage contract;
- the principal (consignor) in a commission (consignment) contract;
- the warrantor in a warranty contract;
- the carrier in a transport contract;
- the forwarder in a transit and forwarding services contract;
- the insured in an insurance contract;
- the creditor in a credit contract;
- the donor in a benefaction contract;
- the guarantor in a guarantee contract; and
- the mortgagor in a mortgage contract.

Contracts on joint production, specialization and co-operation, and construction and installation work, are governed by the law of the country in which such activities take place or the results of the contract are achieved, unless otherwise arranged by the parties.

A contract for the establishment of a joint venture is governed by the law of the country where the joint venture is set up and officially registered.

A contract concluded at an auction, by competitive tenders, or at an exchange is governed by the law of the country whose territory was the site of the auction or competition by tender or accommodates the exchange.

The rights and obligations pertaining to contracts not mentioned above are defined by the law of the country that is the site of the establishment, residence or main activities of the party performing the determining activity under the contract.

Where there is acceptance of the performance of a contract, the law at the place of acceptance is taken into consideration, unless otherwise decided by the parties.

VII. THE AWARD

Like the Model Law, the Law does not differentiate among types of awards but concentrates on the final award. The arbitral tribunal may, at its

discretion, render a partial award on a preliminary issue, or an interim award, for instance in respect of preliminary measures of protection.

According to the Law, a ruling regarding the competence of the arbitral tribunal and the final award can be set aside by the courts.[49] Since the Law provides that court intervention is permissible only in cases specifically provided for in the Law, it follows that a partial award or an interim award cannot be set aside by the courts.[50]

There is no time limit in the Law for the making of the award. However, the Rules provide that the time limit for the award shall not exceed six months from the date of receipt of the statement of claim and the arbitration fee. This period can be prolonged by the Presidium of the ICAC on the basis of a motivated application from either the arbitral tribunal or one of the parties.[51]

When the proceedings are completed, the decision of the arbitral tribunal is to be announced orally to the parties. The arbitral tribunal may choose to announce only the resolutive part of the award. In complicated cases, the award must be announced within five days of the completion of the proceedings. If that rule is to be applied, this must be announced during the proceedings.[52]

The presiding arbitrator may be authorized to decide on procedural questions by himself. However, unless otherwise agreed by the parties, the arbitration award shall be decided by a majority.[53] Neither the Law nor the Rules contain any provision concerning dissenting opinions. An arbitrator who does not agree with the majority may, however, refuse to sign the award. The reason for any omitted signatures shall be explained in the award.[54]

The award shall be made in writing and signed by the sole arbitrator or by the arbitrators. The award shall contain the reasons upon which it is based and a decision regarding the claims and counterclaims as well as on the apportionment of the arbitration fee.[55] The award shall also state the date and the place of arbitration.[56]

The written award shall be sent to the parties within ten days of the date of making the award. The President of the ICAC has the power to extend this term in exceptional cases, but only for ten more days.[57]

If the parties settle their dispute during the arbitral proceedings, the arbitral tribunal shall terminate the proceedings and shall, if the parties so request and the arbitral tribunal does not have any objections against it,

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49 Arts. 16.3 and 34.2 of the Law, Art. 9 of the Rules.
50 Art. 5 of the Law.
51 Art. 4.9 of the Rules.
52 Art. 8.13 of the Rules.
53 Art. 29 of the Law, Art. 8.6 of the Rules.
54 Art. 31.1 of the Law, Art. 8.7 of the Rules.
55 Art. 31.2 of the Law, Art. 8.8 of the Rules.
56 Art. 31.3 of the Law, Art. 8.9 of the Rules.
57 Art. 8.14 of the Rules.

confirm the settlement in the form of an arbitral award on the agreed terms.[58] This is usually requested by the parties. Such an award has the same status as a final award on the merits of the case.

VIII. ARBITRATION FEES

When submitting the statement of claim, the claimant must pay a non-refundable registration fee of USD 200 to the account of the UCCI. The remaining portion of the fee is payable by the claimant within 30 days of receiving the notification from the ICAC stating the amount to be paid. Until the arbitration fee has been paid, the case will not move forward.[59]

The arbitration fee is charged in the currency of the claim or in freely convertible currency. A party located within the territory of the Ukraine may pay in currency officially circulated in the Ukraine calculated as the equivalent to an amount in foreign currency at the rate of purchase by the National Bank of the Ukraine. When the claim is stated in more than one currency, the arbitral tribunal shall determine one currency in which the fee shall be paid.

Costs of the bank transfer of the arbitration fee and expenses that are due to the ICAC shall be borne by the remitting party.

In contrast to the practice of certain other arbitration institutions, the ICAC requires that any interest which is part of the claim must also be taken into account when the fees payable to the institution are computed. Generally, this makes it necessary to compute the interest accrued up to a certain point in time and add it to the basic amount in dispute. Failure to pay the fee may result in the arbitrators leaving the claim for interest aside without notice. It may be emphasized in this context that the fees of the ICAC are low compared to those of arbitration institutions in Western Europe.

IX. PROBLEM AREAS AND CASE ILLUSTRATIONS

A. *Application of the UNCITRAL Arbitration Rules; Interim Measures of Protection*

In recent years the ICAC has become involved in a number of arbitrations applying the UNCITRAL Arbitration Rules. For instance, the ICAC is sometimes nominated by the parties as the competent organ for the appointment of arbitrators. Another variation was presented in an arbitration between a Ukrainian and a Slovak party. Their arbitration clause stipulated that the arbitral proceedings must follow the UNCITRAL Arbitration Rules and that the award must be rendered by the ICAC, whereas the parties had designated the UCCI as the competent organ. Interestingly, in this case, the UCCI appointed arbitrators outside the list of arbitrators of the ICAC.

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[58] Art. 30 of the Law, Art. 8.10 of the Rules.

[59] Art. 5.6 paragraph 2 of the Rules.

An increasingly important issue is the treatment of requests for interim measures of protection. Such requests are fairly rare, but with its significant case load, the ICAC has been exposed to a number of requests for interim measures. Naturally, such requests are normally presented at an early stage, with the request for arbitration/the statement of claim. At that point, the composition of the arbitral tribunal has not yet been completed so the president of the ICAC has dealt with the request. Where the interim measures are granted, they typically have the form of an order not to part with assets or cash involved in the dispute.

B. *Application of the CISG*

There are numerous cases in the practice of the ICAC that concern the application of the United Nations Convention on Contracts for the International Sales of Goods (1980) (the "CISG"). The Ukraine has ratified the CISG with a declaration under Article 96 of the Convention, according to which a Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may make a declaration that any provision that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing shall not apply where any party has his place of business in that State.

In Case No.108п/99, the facts were that the respondent, a Polish company, refused to pay for goods that had been delivered to it, arguing that the contract between the parties, which was made by the exchange of fax transmissions, was not of legal force because it was not signed by the respondent's executive. The respondent challenged the validity of the arbitration clause and, consequently, the competence of the ICAC. The respondent claimed that the goods were accepted as partial reimbursement for expenses incurred by the respondent due to the claimant's default under another contract.

The arbitral tribunal recognized the validity of the contract and, consequently, the arbitration clause in the contract was also held to be valid. In the award, the arbitral tribunal stated that the making of the contract in question could not, as argued by the respondent, be seen as contrary to the provisions of the CISG.

According to Article 11 of the CISG, a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proven by any means, including witness statements. The arbitral tribunal stated that this reflects the widely accepted practice of international trade not to have any formal requirements as to the form of the agreement. The arbitral tribunal further noted that Poland ratified the CISG without any declaration as to the requirement of written form, while the Ukraine ratified the CISG with such a declaration.

Article 154 of the Ukrainian Civil Code recognizes that the requirement for agreements to be made in writing is fulfilled by the exchange of letters, cables, telephone messages, faxes, etc.

In the case under discussion here, each page of the text signed by the parties by fax, presented by the claimant, bore fax transmission details containing date, time of sending and the name, telephone number and city of the respondent. The shipping documents (international waybill - CMR - quality certificate and invoice), as well as all letters of the respondent showed that the goods had been shipped by the claimant and accepted by the respondent under the contract in dispute. The shipping documents and letters also showed that both contracts referred to by the respondent were made and performed by the parties independently and that the validity of the contract was not challenged by the respondent during its fulfilment.

Based on this reasoning, the arbitration tribunal recognized its competence to hear the case and decided the case on the merits.

In a case decided during the year 2000, the arbitrators had to deal with an unusually complicated choice-of-law clause contained in the contract of the parties. It stipulated that the substantive and procedural law of the Ukraine should apply, but in a separate clause the parties had specified that their relations were to be governed by the CISG, if the contract itself did not contain anything to the contrary.

In the arbitration just referred to, the arbitral tribunal concluded that the agreement to apply Ukrainian substantive law did not exclude the application of the CISG. It was noted that both parties had referred to the provisions of the CISG in their oral and written pleadings. Further, it was noted that by virtue of Article 7(2) of the CISG, any matters not expressly settled by the CISG or its general principles were to be settled in conformity with the law applicable by virtue of the rules of private international law. Consequently, the provisions of Ukrainian law were relevant as a subsidiary source of law on matters that had not been settled in the CISG.

The respondent in the arbitration had relied on a contractual clause providing that "the party in fault shall reimburse to the affected party costs connected to inadequate performance of the contract by one from the parties which shall be confirmed by the appropriate documents." This clause, it was submitted, made it impossible for any party to require compensation for loss of profit. The arbitral tribunal determined that this submission could not be acceptable because:

- under Article 6 of the CISG the parties may derogate from or vary the effect of any of its provisions, including those on liability;
- the quoted wording should be interpreted as rules of reimbursement of actual cost of one party, which the other party is liable to compensate subject to, first, its fault, and, secondly, proof through appropriate documents;
- had the parties really intended to exclude the possibility of compensation for any other damage, including the loss of profit (Article 74 of the CISG), this understanding should have been specified expressly.

Consequently, the arbitral tribunal determined that the contract in question did not exclude the right to receive compensation for loss of profit, and that a claim for such compensation had indeed been included in the claim submitted to arbitration.

C. *Unauthorized Execution of Contracts*

One of the more common problems encountered in the practice of the ICAC is the lack of availability of or access to registration documents of foreign companies, resulting in parties signing contracts with unauthorized persons.

There are a number of ICAC cases where the respondents, being foreign legal entities, deny the fact of the conclusion of the contract, and, consequently, the jurisdiction of the ICAC, due to the fact that the contract was not concluded by an authorized person.

In such cases, it is necessary to establish the scope of authority of the physical persons who have concluded the deal on behalf of the legal person. If the deal was concluded by a person acting by power of attorney, the law to be applied to the form and validity of the power of attorney needs to be established. According to Article 567(2) of the Ukrainian Civil Law, the civil capacity of foreign enterprises and organizations fulfilling transactions in foreign trade, as well as connected settlement, insurance and other operations, is determined under the law where the enterprise or organization is established. According to Article 569 of the Ukrainian Civil Code, the form and validity of a power of attorney are determined under the law of the country where the power of attorney was given. However, a power of attorney cannot be recognized as void due to non-observance of form, if it at least meets the requirements of Ukrainian law.

To avoid misunderstandings, a party should request the opposite party to present written authority to sign the contract, accompanied by duly notarized and legalized registration documents of the legal entity. It is necessary to take into account, however, that there are several countries that have special intergovernmental agreements with the Ukraine regarding exclusion of the requirement for legalization. In such cases, the representation documents should be certified by a notary.

If a transaction was entered into by a person who was not authorized to do so, or who exceeded his authority, this circumstance does not have to mean that the bargain is not valid. If the bargain is subsequently approved by an authorized person, Article 63 of the Ukrainian Civil Code recognizes such a transaction as valid from the moment of the conclusion of the contract.

An example of the application of the rules just referred to is Case No. 7b/98. In that case, the Bulgarian respondent had refused to pay the cost of goods delivered to it, referring to the fact that the director of the company did not sign the contract and that the person who did sign the contract was not authorized by the company to do so. Thus, the respondent asked the arbitral

tribunal to decide the question of jurisdiction as a preliminary matter and to terminate the arbitral proceedings.

The claimant argued that the contract was signed on behalf of the Bulgarian company by a representative of the company acting according to a power of attorney given by a duly authorized person whose name and position were not indicated in the power of attorney. The claimant failed to present the properly issued power of attorney of the person who signed the contract on behalf of the Bulgarian company but nevertheless presented an appendix to the contract – the order for delivery of the goods – and a number of letters signed personally by the director of the Bulgarian company, with stamp affixed, and a power of attorney authorizing the representative of the company who signed the contract to receive the goods for and on behalf of the company, and also to execute all operations connected with the fulfilment of the contract. This power of attorney indicated that it was to be presented to the claimant.

The arbitral tribunal did not find it possible to determine the matter of jurisdiction as a preliminary matter but decided on the jurisdictional issue at the same time as making the final award.

The tribunal stated that the respondent had not denied the issuance of this power of attorney and had not refused to receive the goods shipped to it with the participation of its representative. In the certificate of receipt and in the shipping documents, as well as in the invoice, there were references to the contract in dispute. Consequently, the respondent was held to have accepted fulfilment by the claimant of the obligations under the contract.

The arbitral tribunal held that the actions of the respondent amounted to full approval of the transaction by the director of the company and thus it was determined that the contract had been valid from the moment of its conclusion.

D. *Damages*

Sometimes problems arise in the sphere of enforcing penalty clauses. Because this is one of the more common claims before the ICAC, it may be of interest to explain the practice of the ICAC in this respect.

The penalty (fine) stipulated by a contract for delay of the fulfilment of any obligation under the contract, (*e.g.* delay of delivery of goods or non-payment for goods, services etc.,) is enforceable in principle, provided that the relevant arbitration fee has been paid. Any supplementary claims for penalties, for which fees have not been paid, are left out of consideration.

There are stringent requirements in respect of time bars. As the penalty (fine) is a so-called "current sanction," requests for recovery of a penalty are subject to consideration on the merits:

- under the Civil Code of the Ukraine – within the six-month term of the limitation period – for the last six months preceding the presentation of the claim, within the limits of the general three-year term of limitation period;

- under the Convention on the Limitation Period in the International Sales of Goods (New York, 1974) – within the four-year term of limitation period.

Normal damages are recoverable under the common rule, which says that the debtor is obliged to reimburse the creditor for his losses caused by the debtor's failure to execute his obligations under the contract.

At the same time, claims for compensation of damages still constitute a small percentage of the cases before the ICAC and, as a rule, those claims have essential defects.

According to Article 206 of the Ukrainian Civil Code, losses (damages) are understood as costs incurred by the creditor, loss or damage of the creditor's property, and loss of profits that the creditor should have received, had the debtor fulfilled his obligations. The creditor has an obligation to take measures to prevent losses from occurring, or minimizing the size of the losses.

X. CONCLUSIONS AND PERSPECTIVES

There has been growth of international arbitration over the past decade, but it is doubtful if any jurisdiction or arbitral institution can match the growth of the ICAC. The increased case load has been matched by the UCCI providing additional hearing rooms and improved facilities at the headquarters of the ICAC in Kiev.

The reasons for the success of the ICAC are to be found not in the physical facilities, acceptable though they are, but in the integrity and hard work of the officers, arbitrators and staff of the ICAC under the leadership of Professor Igor G. Pobirchenko. Professor Pobirchenko was the father of the ICAC, and he has provided for and watched over the growth of that institution.

Although the scope of this article has not permitted detailed comparisons to be made with other arbitral institutions and the legal frameworks in which they operate, the reader may have concluded that arbitration in Kiev combines elements well known to the Western lawyer, in particular through the close connection between the Law and the Model Law, with the familiar pattern of international arbitration as practiced in the former Soviet Union, notably in Moscow. For instance, the closed list of arbitrators reminds the practitioner of arbitration as it used to be conducted in Moscow.

The actual practice of arbitration in the Ukraine will probably evolve in line with international trends. The tradition of considering witnesses to be low-grade evidence, and therefore perhaps better avoided, may be seen as a stage in the evolution that may be abandoned gradually as parties from the many countries that come to the Ukraine for arbitration bring their own habits with them. In particular, such ideologies include the concept that it is important to hear witnesses.

It has not been possible to examine the practice of the ICAC in detail. It is obvious that with the large number of cases to be decided—almost four cases per every working day of the year—many disputes must be of a standardized

nature and involve counsel and parties that are satisfied even if their day in court is brief. At the same time, the vast body of arbitral experience collected in Kiev must necessarily include a number of interesting and forward-looking issues, such as the extent of discovery, the possible use of written witness statements, the shift in balance from written submissions to oral arguments during a more time-consuming main hearing, etc.

A final word should be added about economics, even though the main body of this article did not deal with arbitrators' fees, etc. It is possible to say that currently there is a balance between fairly modest costs of arbitration, both fees for arbitrators and the costs of the arbitral institution, and proceedings that are conducted and concluded in a very efficient manner with awards promulgated at the end of the brief oral hearing, or within a short period thereafter. If arbitration in the Ukraine develops in the same way as arbitration in Western Europe, the balance is likely to be re-established at a higher level of cost. It will be necessary to accommodate the demand from parties for fuller treatment of their cases, within the framework of the adversarial process, and this development will require higher remuneration to arbitrators as well as to the arbitral institution. As things stand at present, arbitration in Kiev provides access to arbitrators with remarkably high qualifications at a cost that is modest when compared with the levels associated with those arbitral institutions that we meet more frequently in the legal press.